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**HOMELESSNESS, SOCIAL RELATIONS, AND INSTITUTIONAL LOGICS:
PROPERTY RIGHTS WITHOUT PROPERTY?**

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Abstract

We explore whether there is evidence of property rights amongst the homeless, and if so, how these rights are governed. By conducting interviews with 52 homeless people in Cape Town, we show that although the homeless are able to derive some value from assets, and can exclude other members of their community, these rights are precarious and dependent upon state agents not seizing the ‘property’ and overriding the community’s rules of the game. We demonstrate the intersectionality of claims with respect to the same physical property from the varying perspectives of the claimants involved and how this differs depending on the property. Homeless people rely on a community logic to develop rules of the game which results in the appearance of a market logic. In the absence of formal institutions effectively operating in their spaces, they have constituted social norms which provide some semblance of property rights respected intra-group.

Keywords: Property rights; formal/informal institutions; transaction costs; homelessness; institutional logics; qualitative research

JEL codes: K00 Law and Economics General; K11 Property Law; Z13 Economic Sociology; Economic Anthropology; Language; Social and Economic Stratification

1. Introduction

Can those without property possess property rights? The question may seem illogical but underlying it is an important understanding of markets not only as an economic phenomena but as social constructs. Property rights should be thought of as a scale of rights, from that which conforms absolutely to each dimension of legal theory to a lesser scale which includes only some limited dimensions. For example, in housing markets we see rich hybrids of property models, from absolute tenure and leaseholds with detailed formal title deeds held in registry offices, to informal settlements that often exist in developing countries which may or may not have some form of title deed (either formal or informal). In the developing world we often see ‘legal pluralism’ where multiple legal systems coexist within a ‘bounded physical or social space’ and where the ‘official/unofficial, formal/informal and traditional/modern [are] juxtaposed’ (Brown, 2015, p. 238).

Property rights have long been regarded as the foundation of economic development (Kaufman, 2007). Property rights have, since Adam Smith, occupied primacy of place within economic and legal discourse and are regarded as essential for the efficient allocation and exploitation of scarce resources (Demsetz, 1964, 1966, 1967).ⁱⁱ Within economic theory, property rights feature pre-eminently as regards a multitude of themes: R&D activity by local and foreign firms (Gittelman, 2008; Luo, Sun, and Wang, 2011), economic growth (Bose, Murshid, and Wurm, 2012), land values (Markussen, Tarp, and Van den Broeck, 2011; Monkkonen, 2016), effects on poverty (Parizeau, 2015; Webster, Wu, Zhang and Sarkar, 2016), uncertainty and investment decisions (Kemeny, Castellaneta, Conti, and Veloso, 2014), boundaries between formal and informal activity (Adriaenssens and Hendrickx, 2015; Kus, 2010), innovation (Hoetker and Agarwal, 2007; Jay, 2013; Sweet and Maggio, 2015), market construction (McKague, Zietsma, and Oliver, 2015), institutional theory (Batjargal, Hitt, Tsui, Arregle, Webb, and Miller, 2013; Battilana and Casciaro, 2012), and various theories on entrepreneurship (Gurses and Ozcan, 2015).

The prominence of property rights within economic and social theory means that it is important that we are very clear as to what these rights entail. There is a danger that these rights are seen as dichotomous in that they either exist fully or not at all. This is analogous to the discourse on institutions and institutional voids. The latter has gained traction in various sub disciplines within management and economic theory and particularly with the rise of research into developing and

emerging markets (Khanna and Palepu, 2010; Dhanaraj and Khanna, 2011; Luiz and Stewart, 2014; Luiz et al., 2017; Peng, Wang, and Jiang, 2008). But voids imply the complete absence of institutions and if this were the case there would be no activity possible and yet markets often thrive where these ‘voids’ supposedly exist. The institutions in some developing countries may not look the same as that in industrialized countries and may not be as ‘efficient’ in terms of how *we* want them to operate but they serve a purpose within *their* particular contexts. Increasingly, we understand that institutions are more complex and that actors find ways of carving out institutional spaces which allow them to operate in innovative ways (Dahan, Doh, Oetzel, and Yaziji, 2010; Feinberg and Gupta, 2009; Mair, Marti, and Ventresca, 2012; Murphy, Perrot, and Rivera-Santos, 2012). We argue that property rights have similar characteristics and that they are not absolute and that there are rich pluralities in existence.

This study explores the case of homelessness using a qualitative methodology whereby we interviewed 52 homeless people in Cape Town, South Africa. It asks whether there is evidence of property rights, and if so, how these rights are governed, and how these are balanced against other competing claims. Not only do we see forms of property rights not being governed by formal institutions, unlike other cases, such as squatters occupying land on urban peripheries and arguing for recognition of their rights against existing titleholders, in the case of the homeless we see a further hybrid, where rights are not exercised against titleholders but rather a hierarchy of economic rights against other homeless. In other words, we see the expression of these rights within a micro community and utilizing a community logic that is not enforceable outside of that community. It reinforces the notion of markets as social spaces, constructed on the basis of social relations (Bandelj, 2016; Granovetter, 1985; Krippner, 2001, 2002).

Although the paper is interdisciplinary, it uses a law and economics lens which results in limitations but we work with these limitations to demonstrate the weaknesses of relying only on formal institutions and underplaying the role of self-organization. Furthermore, we demonstrate intersectionality and community logics and how the homeless are able to maneuver between the formal and informal rules. Our work contributes to our understanding of the organization and development of markets especially in less developed settings. By incorporating legal, economic, management, and sociological perspectives on markets and institutions it advances our conception

of how actors function in ‘in-between’ institutional spaces and indeed how they can construct markets in the absence of recognized legal rights through social constructs.

2. Literature review

2.1 Different forms of property rights and enforcement of those rights

In its most complete form, property rights ‘gives its owner the right to derive value from the asset, to exclude others from using it, and to transfer the asset to others.’ But these rights may not always be complete and may result in an owner deriving ‘only some value from the asset, excluding only some people from using it, or transferring only certain uses for a specified time period’ (Anderson and McChesney, 2003, p. 1). This has resulted in much debate in both the philosophical and legal spheres over what comprises property rights.ⁱⁱⁱ One view of property rights has focused on property rights as a ‘bundle of sticks’, where property rights are defined as a collection of different legal actions available to a person in possession of such rights. The bundle of sticks is a commonly used metaphor to describe the list of rights that vest in a holder pertaining to property. Robilant (2013) provides a concise formulation of the bundle as having four distinct characteristics:

1. The bundle of sticks is a set of ‘analytically distinct entitlements’;
2. The bundle of sticks approach is relational in nature, as it determines how people relate to each other around a common property;
3. The bundle is assorted and backed by a state; and
4. Each of the sticks within the bundle is malleable, and is subject to change based on shifting regulations and law, which in turn are shaped by ethics and policy considerations.

A bundle of sticks can be seen as the collection of rights and obligations that govern the relationship between people over property.

Within institutional theory we can differentiate between property rights as economic and/or legal rights (Barzel, 2015; Hodgson, 2015). For Alchian (1965), economic rights are property rights of use that exist in reality, and are dependent on ‘custom, reciprocity and voluntary constraints’ (Allen, 2000, p. 898). In contrast, legal property rights are those which are determined,

shaped and enforced by a legal system (Gray and Gray, 1998). Economic rights can be recognized and endorsed by the state, but such recognition is not the defining feature of an economic property right (Alchian, 1965). Allen (2000, p. 989) notes that this definition is commonly accepted and that although ‘economic property rights are enhanced by the law, they are ultimately use rights and the greater extent one can exercise these uses and bear the consequences the greater are the property rights, regardless of the law’.

Barzel (1997, p. 3), following Alchian, defines economic property rights as ‘the individual’s ability, in expected terms, to consume the good (or the services of the asset) directly or to consume it indirectly through exchange’. This definition is linked to restrictions that are inherent in the asset – a person will have fewer rights if the asset can be easily stolen or has restrictions on the manner in which it can be traded (Barzel, 1997; Galiani and Schargrodsky, 2014). In addition, an important characteristic of an economic right is the maintenance of a fluidity of the boundaries of the right. With any changes to the individual’s ability to consume the services of the asset (by encroachment or through theft, for example), the fundamental content of the economic property right will shift to reflect the new context (Barzel, 1997). The notion of economic rights can thus be summarized as the right of use to property, which may not be legally recognized (nor protected), and where that right of use is relative to factors influencing the nature of the asset itself. While economic rights have been characterized as ‘informal rights’ (Galiani and Schargrodsky, 2014, p. 108), this characterization has been made by juxtaposition with ‘formal’ rights, or legal property rights.

Different types of property rights allocation are possible depending on the nature of the resource and whether it entails state/public ownership, open access, common ownership, or private ownership. Among the claimants to property rights, we have the public, the state, and private property owners. These rights are not definitive and competing claims are possible as in the case of indigenous claims to land or informal squatter settlements (in either public or private possession) or in the prevalence of common property. This raises the need for enforcement of the rights and it has been suggested that the most appropriate form of enforcement lies in the term governance of rights, which is understood to be the process by which the principle of exclusion is mediated (Merrill and Smith, 2001, 2011; Smith, 2002). Governance requires that all members of a

particular community understand the rules of the game, and will take appropriate action to keep playing within the rules (Smith, 2002).

At the most formal level we have the state and Hodgson (2015) makes the point that legal factors, involving the recognition of authority, are important to property rights whether in an economic or legal sphere. He refers to De Soto (2001, p. 683) who pointed out the deleterious implications of neglecting the ‘legal infrastructure that buttresses property’. De Soto (2001, p. 157) places the commercial aspects of property rights at the core of the subject. In order for property to be translated into gains, it needs to be able to be traded, or, in De Soto’s (2001, p. 7) words, to ‘transform assets and labor into capital’. The De Soto effect has received support (Besley, Burchardi, and Ghatak, 2012; Galiani and Schargrodsky, 2014; Williamson and Kerekes, 2011). However, the broad approach of implementing formal land title systems has been criticized through the implication that a policy decision to formalize land tenure can allow a state to escape moral and constitutional obligations to provide adequate public services and that it may underestimate the role that informal institutions play in determining the security of property rights (Brown, 2015; Sanghera and Satybaldieva, 2012; Williamson and Kerekes, 2011).

The state is not the only enforcer of property rights and Hodgson (2015, p. 701) argues that whilst the ‘success of capitalism depends on systems of law enforcement’, that in ‘their absence people fall back on other means of establishing obligations and ensuring compliance’. Such systems of spontaneous enforcement, which may rely on social ties, bureaucratic co-option, and threats of violence, show how ‘commercial agreements can be maintained in the absence of adequate state systems of law’. A key feature of any set of rules is the creation of social norms via ‘repeat games’ as these norms create relational constraints (Williamson, 1993). This speaks to the quality of the institution with higher levels of quality being associated with lower transactional costs. Key to establishing quality is credibility and commitment (North, 1981, 1989), two aspects that reinforce the rules through repeat games as participants feel that their interests will be dealt with in accordance with the rules. Multiple interactions between market actors forge social ties of trust and understanding particularly if the market exchange is repetitious. By socially embedding this exchange, in the context of institutional failures, markets are able to ‘develop and evolve’ as in-group members rely on a ‘cohesive social structure’ to solve market problems (McKague et al., 2015, p. 1086). Eggertson (2013) notes that informal institutions need not display the permanent

quality of formal institutions, and that their lifespan could be limited to brief periods during which actors come to some sort of agreement regarding the applicable rules of the game.

2.2 Intersectionality of claims and rights

Markus (2012, p. 242) makes the point that '[O]wnership claims remain unsettled in much of the developing world' and that this is often related to the fact that developing states may be weak. In these contexts, property rights may be contested and the state may not be the only guarantor of the enforcement of property rights. This may result in a more bottom-up approach to securing property. He (p.272) notes that in countries as diverse as Peru, Egypt and post-1945 Japan, 'legally effective allocation of property rights, triggering growth and investment by allowing assets to be used as collateral, emerged only to the extent *local informal consensus regarding property rights' protection* preexisted (and was later acknowledged by) formal national institutions.' Even in the case of the development of British property rights, this was 'secured through the *informal power of the gentry*', manifested through its alliances with militias and its ability to manage property efficiently, and that the formal institutions '*gradually came to reflect* the informal power of owners' over time. This testifies to the often endogenous nature of the development of property rights and how competing claims and rights are 'settled' over time. Throughout history we have seen an intersectionality of claims and rights as regards property and the institutionalization of these rights has often been the result of messy compromises and trade-offs, violence, clientelism, corruption, power battles, or the de facto becoming the de jure through time and practice.

Where institutional capacity is poor, laws may be weakly enforced or not at all.^{iv} Holland (2016, p. 233) raises a further phenomenon which is distinct from weak enforcement, namely the concept of forbearance which she defines as the 'intentional and revocable government leniency toward violations of the law'. She argues (p. 232) that in 'much of the developing world, legal rules are ignored' and that this gap between 'lived reality and parchment law' are often interpreted to reflect a weak state but may in fact represent forbearance. Politicians may choose not to enforce laws to mobilize voters and to signal their distributive commitments in the context of inadequate social policy. She explains these strategies by presenting data on street vending and squatting in urban Latin America. In this way, the process of forbearance by the state results in the growing acceptance and institutionalization of activities that may formally be illegal. Squatters, may over time, find a gradual de facto recognition of their squatting rights on land which may formally be

deeded elsewhere. The longer they are allowed to stay on the contested land, the stronger the claims they develop to it as a matter of custom.

Likewise, Schlicht (1993, p. 178) argues that '[H]istory creates entitlements, and these influence behavior'. He demonstrates the importance of customs in everyday market transactions and that they may make unfeasible transactions possible or may block certain transactions. Furthermore, customs provide the groundwork for property and contract and that forms of property emerge as arrangements become 'dominant in social evolution' (p.181). Schlicht (2008, p. 615) states that effective norms shape compliance and induce entitlements and obligations: 'Entitlements are rights, as perceived by the individuals. They are not, however, abstract legal rights. Rather, they denote the subjectively perceived rights that go along with a motivational disposition to defend them.' We see these perceived rights manifest in many different ways within developing countries and there are a multitude of arrangements through which formal and informal institutions accommodate and occasionally resolve the intersectionality of claims and rights. Our case of the homeless will demonstrate the norms and customs and rules which have developed to govern the homeless amongst themselves in their spaces, and to arrange the hierarchy of competing claims.

2.3 Property rights and the homeless

Waldron (1991, p. 299) defines homelessness as: 'A person who is homeless is, obviously enough, a person who has no home. One way of describing the plight of a homeless individual might be to say that there is no place governed by a private property rule where he is allowed to be.' Baron (2005, p. 1429) notes that homelessness is 'a negative, a collection of lacks'.

We have noted that whilst legal property rights concern the formal rights determined and shaped by a legal system, that economic property rights are use rights, and are founded on 'custom, reciprocity and voluntary constraints' (Allen, 2000, p. 898). This creates the possibility that economic and legal property rights, each vested in different parties, can coexist simultaneously in the same property. This mitigates the concern noted above of the tension between private property and homeless people, given that such tension arises exclusively from legal property rights. Members of a community will develop their own rules of the property rights game when negotiating access to a shared resource (see for instance Ellickson, 1993; Ostrom et al.,

1992). In considering homeless people as members of a community negotiating shared rules to shared public spaces, the basis for testing the content of such rights is formed. This suggests a relationship between the perception of the value of property rights, acknowledgment of boundaries, and a careful method of engagement around such rights.

Access to advantageous locations provide greater benefit and are more sought after. Du Toit (2010, p. 113) notes that homeless people are drawn towards inner-city public spaces ('zones of dependence') through the relationship between high volumes of people and the associated economic opportunities. This suggests that the attraction of the target population to areas that contain specific economic advantages is an indicator that homeless people broadly act in accordance with their self-interest, and that notionally within inner city areas there will exist more advantageous locations than others, which in turn provides the basis for the emergence of property rights. Valado's (2006) study of homeless people in Tucson examines the activities that homeless people rely upon to generate income. These include 'panhandling' (begging), accessing regular charity vouchers and food stamps, selling drugs and scavenging. Critically, she notes that homeless people made efforts to claim, mark and defend space using clearly defined strategies. Two critical features emerge. Firstly, the activities reported as being central to homeless people's livelihoods in Tucson can be considered to be location-specific activities – begging, for instance, is optimized in higher traffic areas. Secondly, the efforts to claim, mark and defend space speak of a claim to a property right, almost in direct accord with the theory discussed above.

The question of how people relate to one another for access to a shared resource is particularly relevant to this paper because of the position of homeless people in occupying property and presumably competing with each other for the most advantageous positions. In his seminal paper, Hardin (1968) argued that when faced with a common resource, users were unable to come to a mutually beneficial arrangement to prevent depletion of that resource. The 'Tragedy of the Commons' assumes that because people are unable to self- and community-regulate the use of a shared resource, private property and property rights represent the most optimal manner to avoid the decimation of common pool resources (Demsetz, 1967; Hardin, 1968; Ostrom, 2008). The 'Tragedy' was accepted as the invariable consequence of common pool resources (and therefore as justification for private property rights and privatization of public property) until the intervention of Ostrom in a series of papers (Ostrom, 1999, 2008; Ostrom and Schlager, 1996; Ostrom et al.,

1992). She argued that policy makers should not presume that ‘the individuals involved are caught in an inexorable tragedy from which there is no mistake’ (Ostrom et al., 1992, p. 414). Her findings showed that when people are provided with an opportunity to formulate their own rules regarding access to a shared resource, they would frequently do so in a manner that secured higher joint outcomes, and would do so without the need for an external party.

The test of the content of such property rights is seen as the applicability of such rights against other members of the same (homeless) community. This reinforces the notion that ‘social structuring provides the necessary context for economic transactions’ (McKague et al., 2015, p. 1087). The community logic (to use Venkataraman et al.’s term, 2016) within the homeless population provides a basis for a shared understanding of the rules of the game and these rules are enforceable within this community. But this shared understanding does not translate into a market logic outside of this community. Whilst the social relations result in levels of trust and social capital (Kamath and Cowan, 2015) which allow for a shared understanding of rules and collective rationalization, this is not rationalized (in the Weberian sense) into a formalized process whereby these rights are enforceable outside of the community. Venkataraman et al. (2016, p. 711) argue that these contradictory logics can co-exist and be ‘fruitfully combined’.

It is evident that homeless people often have ‘their’ property rights negatively influenced by the effect of formal institutions – this has been reflected in literature as the privatization of public space, leading to the herding of homeless people away from areas previously accessed (Baron, 2004, 2005; Casey, Goudie, and Reeve, 2008; Waldron, 1991). If we return to North and his suggestion that institutions represent the rules of the game and a collective understanding of a particular rule, then the possibility emerges that homeless people could define their own rules of their game, applicable to members of that particular group, for the use of property. The repetitious nature of their interactions create social relations which can solve market problems such as agency and transaction costs (McKague et al., 2015, p. 1086). These informal institutions need not be permanent as long as it is a set of shared rules of the game. These rules may only be applicable for a short period, and may arise spontaneously, but will govern the transaction costs homeless people encounter in establishing, defending and maintaining their property rights.^v

In what follows, we examine whether there is evidence of some economic property rights amongst the homeless, as defined above, and if so, how these rights are governed, and how these are balanced against other competing claims.

3. Research methodology

Qualitative research methodology was used for this research as it is a useful approach for examining people in their particular realities. Data was gathered through semi-structured interviews with respondents that fell within the population group of homeless people. Du Toit (2010, p. 113) defines three separate categories of homeless people within a South African metropolitan context. These are (a) detached homeless persons, (b) temporary overnight sleepers, and (c) informal settlement dwellers. He notes that ‘temporary overnight sleepers’ include people who have recently been evicted and people who are homeless during the week. In other words, people who have a defined home, presumably in a remote location, but who elect to sleep rough within a city to avoid the transaction costs of having to commute to and from that location to a city on a daily basis (du Toit, 2010). This paper focuses on those persons who are ‘detached homeless persons’. However, this definition remains problematic. Tipple and Speak (2005), in a survey of the definitions of homelessness used within various developing countries, show that there are additional nuances that require consideration. These include lifestyle, location, permanence of occupation or security of tenure, housing quality, and welfare entitlement. The *Fédération Européenne d'Associations Nationales Travaillant avec les Sans-Abri* (FEANTSA, 2014) uses the criteria of ‘rooflessness’ which they define as being without a shelter of any kind and sleeping rough. They therefore rely on the twin factors of location and permanence of occupation or security of tenure as their defining principles.

Accordingly, the population that formed the subject of this study are homeless persons, who are considered to be ‘roofless’ and who do not enjoy rights of permanent occupation. These criteria were assessed at the commencement of each interview through the question ‘where did you sleep last night?’ Following responses, interviews were either terminated (the potential respondent did not meet the required criteria) or continued. The interviews were conducted in the Cape Town (South Africa) city area and its immediate surrounds. 52 interviews were conducted with

respondents who met the criteria noted above. We use pseudonyms to protect the identity of the interviewee.

We utilized a semi-structured questionnaire – it was semi structured so as to align the interview with our key research questions but with sufficient flexibility to allow questions to evolve as the interview proceeded. This was especially important with our particular respondents who often wandered in their responses and we wanted to give them the freedom to determine the pace and nature of the interview whilst still being able to focus it on our research questions. The questionnaire addressed issues relating to the relationship between a place and the motivation for occupying that place, time allocation for the establishment of these rights, the effects of formal and informal institutions on the applicable rules of the game, and the link between property rights, tradability, and entry and exit.

The procedure used for data collection draws on the work of Valado (2006). We identified recruitment sites that met certain criteria, and which other respondents had identified as heavily used by homeless people. Following on from the identification of the particular locations, we spent significant time within those locations to establish credibility with the research study group. At the commencement of each interview, consent was obtained from each respondent. This consent was captured as part of the interview recording. Interviews were transcribed and then analyzed. The Framework Approach was relied upon as the structured process for the analysis of qualitative data. It is constituted of five stages: familiarization with data, creating a thematic framework, coding and indexing of data, charting and mapping and interpretation.

There are a number of inherent challenges in interviewing homeless people, including reliance on self-reporting, inconsistency of method through the impact of other variables, and the lack of information to corroborate the interviewee's disclosures (Tsemberis, McHugo, Williams, Hanrahan, and Stefancic, 2007). Noting the limitation of the last and first mentioned, inconsistency of method was managed by attempting, where possible, to interview respondents outside of mining windows (see Appendix 1 for explanation of terms used), and to interview respondents in the most suitable place possible and at the best times to ensure their coherence.

The validity of the research was ensured in various ways. From a broad perspective, it is noted that theoretical validity is an important step towards ensuring validity. Theoretical validity is the

match between data and theory and is enhanced by extended fieldwork and by theory triangulation. The data collection process relied not only on the interviews themselves, but on extended periods of observation and notetaking. All-in-all the interaction process with our respondents started in September 2014 and continued through until July 2016

The various layers of the research questions ensured that respondents were given an opportunity to provide responses that speak to a wide range of property rights issues, instead of a single perspective. In addition, the theory underpinning our research provides an opportunity to triangulate findings. It must be noted that it is not the intention of this paper to generalize its results as being applicable to all homeless people as we are using this example as a unit of analysis to describe a particular context.

Reliability pertains to the consistency of measured results and, within a qualitative study, coding is a key determinant of reliability. The issue of discriminant capacity of the coder in categorizing text content has been addressed by using factual categories as the basis for coding. The theory underpinning this study requires emphasis to be placed on themes that surround factual circumstances and the direct opinions expressed about those circumstances. Accordingly, it is suggested that a researcher would reasonably reach the same conclusions regarding coding and thematic choice. At all stages, we ensured that there is a clear audit trail available for scrutiny, including notes, recordings and transcripts of all interviews.

Ethical clearance for this study was obtained from Ethics Committees within the universities the researchers are attached to and we were particularly careful to ensure that participation was voluntary, that they were free to stop the interview at any point or to not answer any questions that made them uncomfortable. As already mentioned, we tried not to get in the way of their daily mining activities and spent a significant amount of time gaining their trust and building up our own credibility.

4. Presentation of results

4.1 Location choices and economic advantages

Economists argue that the key driver for the creation of property rights is personal economic benefit derived from such rights (Demsetz, 1964). We see elements of this within our homeless

population as they seek to exercise some ‘ownership’ over resources through an understanding amongst themselves - a community logic; not in formal law nor against others outside the community. For example, the respondent group derived direct personal economic benefit from the mining of bins. The term (see Appendix 1) is related to mining in its ordinary sense, where a resource is deliberately and systematically extracted (and processed) to create economic value for the miner. From mining, a stroller is able to obtain goods discarded as waste to sell them onwards at high-traffic locations. Mining presents the secondary opportunity to source food but the predominant incentive to mine is to generate cash.

The City of Cape Town waste collection schedule determines on which day specific areas will have their waste collected. Households place their bins outside on the same day each week. This situation could result in conflict between the miners, but the schedules lend themselves neatly to a repeat game which requires a more credible rule than one that simply arises at the point where two strollers meet at a bin. Respondents avoid confrontation through a clearly defined rule of first-come-first-served for the mining of a specific bin. A more significant opportunity is where an individual is allowed to exclusively mine the bins from a large apartment complex. By demonstrating reliability (being outside the apartment block when the supervisor needs to move the bins outside), consistency (being there each week) and usefulness (cleaning the bins after mining and thus performing an undesirable piece of work), a stroller is able to build a relationship with a building supervisor. The apex point of this relationship is being granted permission by the supervisor to enter the property to remove the bins. At this point, the bins from that complex are regarded as temporarily belonging to that stroller. In reaching that particular status, a stroller has successfully established a right in the eyes of both the supervisor and other strollers, and thereby lowered transaction costs.

‘You see it works like this – sometimes if you’re there first then they’re yours, but if you are not first, you get nothing... Some places, they say, ‘that’s my bins’. And they can do nothing, because it’s yours, you take it out, you help the caretaker. That’s your property. So you arrange with the caretaker to take out the bins – then it’s your bins. The caretaker will see that nobody scratches there, because he knows who you are. He can trust you to go inside to fetch the bins’ (Hendricks, Sea Point).

The development of such a relationship requires a deliberate trade-off. In attempting to initiate a bond with a supervisor, a stroller will forsake the short-term opportunity available on that day to mine other bins, instead using her time for future benefit. This suggests a trade-off between production and the creation of property rights (Grossman, 2000). However, as Grossman notes, the trade-off of the allocation of time for either creating property rights or production is dependent on factors including whether that right can be created. The role of the supervisor, as both gatekeeper to the opportunity and as the allocator and enforcer of the right, is a factor that suggests there is an environment conducive to the creation of property rights.

The opportunity to have exclusive access to mine a large number of bins on a weekly basis is arguably a longer term economic benefit, which justifies the investment of time and trade-off of short term production (Demsetz, 1967). In addition, the role played by a supervisor suggests the presence of a mechanism to protect such rights, implying a lessor need for an investment into fighting skills to protect the property right from competition (Muthoo, 2004).

The first-come-first-served rule for mining is a restraint for strollers as an acknowledgement of the competition for resources. Given that many bins are placed at curbside either the evening before scheduled waste collection, or early in the morning on the day, successful mining requires a central location. This allows for speed to mining sites as proximity is a key competitive advantage. In addition, a central location allows for access into inner-city areas where mined goods can be traded for cash. An optimal location has equidistant access to both mining and selling to minimize time wastage and to increase productivity. A secure night-time location that allows for both sustained mining and access to trade represents opportunity for future economic benefit.

4.2 Competing rights and the right to exclude

Our definition of property rights highlighted three elements, namely the ability to derive value from the asset, to exclude others from using it, and to transfer the asset to others (Anderson and McChesney, 2003). In the previous section we illustrated their ability to derive some value from the assets, and to exclude others from using it but these were limited within the community logic. The respondent group displayed a strong orientation toward the right to exclude. Specifically, this orientation was directed at other homeless people, and was not found to extend to members of the general public, property owners, or the police. It was noted that respondents had either been

invited or had invited others to establish a claim within the broader public space. Despite this, respondents (predominantly those occupying space-constrained areas like a cave or an overhang) maintained that they were able to exclude others from their specific space. In this regard, a distinction can be drawn between those occupying a space within a larger public space, and those who occupy a space with limited capacity for newcomers. With regard to the latter, it is suggested that respondents could be classified as a limited group of insiders, acting in concert to limit access by others (Smith, 2002). The former group face inherent restraints in being able to exercise a right to exclude others from a wider public space, and in being unable to police and defend a larger territory.

The distinction between the two groups was further emphasized through a difference in attitude to newcomers or people with competing claims. Respondents occupying space within a larger area (a tree within a park, for instance) indicated that their approach to encroachment was to first negotiate and then to fight, whilst those who occupy space-constrained areas were demonstrably less flexible in their approach.

‘No, one must be out because it’s my place’ (Damara, Bantry Bay).

‘He can’t. We will tell him there’s no way he can come... This is our place. He can’t come and take... this is our place... You see, you don’t enter another man’s property. If I am working here, you can’t work here’ (Hendricks, Sea Point).

The respondents who had established themselves within public spaces were emphatic about their claim to such space against other homeless. It was found that longer-tenure residents within a micro-community (a community within a specific public place) acted in concert to publicize existing claims to newcomers, and to enforce existing claims if necessary. This suggests that primary claims are regarded as stronger than subsequent claims by the respondent group (Grossman, 2000). In addition, existing claims can be seen as a specific feature that a newcomer would need to manage in order to establish a new claim. To successfully develop tenure, and thus be able to access sustained mining opportunities, a newcomer would need to internalize the externalities posed by existing residents: *‘It’s a big house, there’s a lot of rooms – you can find somewhere else a nice room but that room is taken and this room is taken’ (Josias, De Waal Park).*

The orientation towards the right to exclude was extended to the mining of bins. As described above, the first-come-first-serve rule is premised on the right of the first-arrived stroller to exclude all others from a particular bin. In the instance of a supervisor-sanctioned relationship, a stroller is able to rely on the supervisor to enforce her right to exclude. This additional layer of protection suggests a shift towards governance of rights, as a successful challenge to the incumbent is unlikely to result in a succession of the right (Smith, 2002).

The story of the Maine Lobster gangs has been used in academic writing as an illustration of self-governance of a shared resource (Acheson, 1985; Ostrom, 2008; Schlager and Ostrom, 1992) and of how a group excludes others from a shared resource through limited membership and boundary demarcation (Smith, 2002). It was observed that the respondents used relational factors like established tenure and familiarity to establish a group within a public space and that these groups would act to exclude others from establishing competing claims to spaces occupied by members, and to prevent parties external to the group from stealing belongings. However, these groups were limited in their ability to consistently enforce exclusion through periods where no group members were present to act. For emerging or insecure rights contexts, defense of boundaries requires the use of sentries (Alston, Harris, and Mueller, 2012). This implies that such groups may fall outside of the definition of a collective-choice property regime exercising a right to exclude (Schlager and Ostrom, 1992).

Perhaps predictably, the most common means of enforcing exclusion was by threat of or use of violence. This is consistent with the position noted by Alston *et al.* (2012, p. 766), who state that ‘when each side perceives that it has a reasonable chance of asserting its right by force, conflict is the likely outcome’. However, in the instance of well-established tenure rights and the presence of groups demonstrating a commitment to enforcing individual rights on behalf of a collective, the threat of violence is often adequate to enable resolution of a dispute (Skaperdas, 1992). This was confirmed in our interviews and our observations that violence was limited but that enforcement would occur through violence as a last resort. Respondents would often say if someone tried to intrude in their space ‘*we will chase them with sticks.*’ But this happened surprisingly seldom given the nature of their living environment.

Respondents noted that they had the ability to return to their location after an absence (often absences ranged from a few days to several months of hospital treatment or incarceration). Despite

such absence, respondents were able to re-establish their rights to a particular location by enforcing the exclusion of others from that location. This implies that well-entrenched incumbents enjoy an advantage over subsequent claimants despite a period of absence from occupation (Grossman, 2000). This advantage was noted as being rooted in relational factors and the willingness of external parties, particularly law enforcement officials and neighboring private property owners, to act in support of the original incumbent's claim for restoration. Yet despite their assurances that they 'owned' the space respondents generally preferred to leave at least one of the group at the location to ensure that someone was always present to protect their property but this was to prevent petty theft of belongings rather than of the living space.

Several respondents were indignant at the suggestion we posed that the space they were occupying would be free for others if they left the space to go mining. They were genuinely perplexed by the idea that someone else could claim the same space: *'This place is mine. Nobody else can come. How can they come?'* (Funeka, Green Point). The same respondent gave an example that even when she had been incarcerated for several months, she could return to her space and nobody had taken it. Her behavior and words demonstrated a real sense of entitlement and 'ownership' of that space and this came through repeatedly. When we pushed respondents and asked if that claim extended to the legally recognized owners of private property or to the City of Cape Town as regards public spaces, we were often looked at with bewilderment as if the answer should be obvious and it was always in the negative. The rights extended within the homeless group only. But respondents discussed how the legal owners gave them greater rights in the eyes of the other homeless and showed pride in this fact. One respondent (Bongani, Green Point) who lived in bushes bordering a local tennis club indicated how the club caretaker recognized his claim to that space by chasing other homeless away if they tried to occupy that space: *'He knows it's me'*.

It is noted that an *in rem* right to exclude is typically understood as a legal right valid against the rest of the world (Merrill and Smith, 2001; Smith, 2002). However, the respondent group are not in a legal position to enforce their right to exclude against the rest of the world. Instead their right to exclude is largely limited to members of the same group. This is consistent with the definitional status of homeless people as people without formal *legal* property rights.

4.3 Transaction costs amongst the homeless

The emergence of economic property rights among the respondent group suggests that there is little actual cost in establishing a claim to a space within public property. The ability to establish a claim is relative to the presence of existing claims, and the availability of a right to be claimed, with private property a constraining factor. Respondents noted that establishing a right involves little more than the selection of an available place.

There are specific costs associated with maintaining a property right and these costs come about largely in the form of managing the risk of theft of blankets and the effect of PK operations carried out by law enforcement officials. A stroller can mitigate both risks by electing to move to a safer location away from areas where PK occurs. However, this will require a trade-off that will minimize production ability.

Respondents managed the issue of their personal belongings in two separate ways. One group carried their blankets (and in fact, all of their belongings) with them constantly as a means to avoid the risk of theft. The other group stored their blankets at or near their night-time location, using manholes, trees and holes dug into beach sand as storage facilities. These respondents require mobility for mining, and in addition, often were able to rely on group members to ward off threats of theft. Those respondents who stored their blankets on site reported that it was relatively easy to obtain replacements. This suggests that they are not actively seeking to avoid risk (unlike the blanket carriers) and have established that the gains from successful mining are in excess of the cost of averting risk by carrying blankets and impairing mobility.

In examining the role played by groups in the enforcement of rights, it was clear that despite the existence of such groups, they did not play a consistently credible role in averting threats to existing rights. With respect to the theft of blankets stored on site, a group member is only able to act if he or she is present. In addition, the seemingly impervious approach of organized homeless gangsters to existing rules further fractures the credibility of group enforcement. This suggests that despite attempts to create an institutional response to maintain property rights, the institutional quality has remained poor, with associated higher transaction costs. The practice of PK appeared at first to confirm the limitation to the rules of the stroller game imposed by formal institutions. As Feige (1990, p. 993) notes: ‘The salience of informal activities derives from the fact that their existence is intimately connected with the institutional arrangements imposed by the state. As such, any positive or negative outcomes associated with the emergence of the informal economy

can, in principle, be reinforced or weakened by policy actions which modify the institutional setting.’

The use of PK activities by law enforcement supports the negative influence of formal institutions on homeless people and their use of space (Baron, 2004, 2005; Waldron, 1991). However, following an arrest for PK, strollers returned to their original locations. This suggests that despite a deliberate formal state intervention to weaken or sever the ties between a stroller and her demarcated place, as per Feige (1990), respondents had internalized this externality as yet another disturbance and incorporated this as a cost of maintaining a right to occupation (Allen, 2000). Furthermore our respondents were often upset by the erratic behavior of the police in that they sometimes appeared to recognize their right to certain spaces and at other times they would remove them from these same spaces. *Bongani* indicated that he had been living in that space for close to 10 years and had for many years been left alone by the police although recently he had been subject to harassment from them. He could not understand this as, in his mind, he had been given tacit approval from the police years before when they ignored him and now they were ‘reneging’ on this and behaving inconsistently.

4.4 Governance of the Commons

The reliance of respondents on access to public property (for both night-time accommodation and for access to mining opportunities) suggests a relationship between adherence to rules and maintaining access to shared resources. In the context of the respondents, degradation of the resource is not only about a depletion of the production capacity of that resource, but also the diminished ability of stroller occupants to maintain credible claims to property in the face of increased attention by law enforcement officials or formal holders of property rights. The issue of PK noted above is an example of a structured interaction between strollers and law enforcement agencies. Respondents were aware that they needed to adhere to certain standards of behavior and activities in that any deviation from such standards could result in pressure being brought to bear on such individuals by law enforcement agencies. Examples include keeping a sleeping area tidy, avoiding sleeping with blankets during the day, and being awake by specific times. By not observing these rules, the tenure status of that particular person would be undermined. One group of homeless people were located at the side of a block of apartments and they realized the owners of those apartments had the ability to make their lives difficult if they so choose. But they had

reached an implicit détente with the owners accepting them on condition that they kept the place neat and remained quiet. The respondents would hush us if we asked questions too loudly as they did not want to annoy the owners. Also they indicated to us that part of their responsibility was to ensure that others did not come and disturb the property owners and that they would protect their cars from being damaged.

‘So we don’t disturb them (the apartment dwellers). We keep it clean and not too much noise. They know us. They leave us alone’ (Faaiza, Three Anchor Bay).

‘Like for instance, we’re not supposed to sleep late, so they (law enforcement officials) will come in the morning and come wake up people. To make their job easier, rather get up earlier – you see – get in their good books and they won’t treat you bad, because if they must come every time to wake you up, they gonna get tired and they gonna get cross’ (Zolani, Gardens).

The formation of smaller groups within the stroller community suggests one of the key benefits noted by Ostrom (1999) with regard to common-pool resources, namely the inclusion of trustworthy participants. The effect of a smaller group, acting in concert with a shared understanding of applicable rules, lowers defense and enforcement costs for members of that group. This is supported through observed group’s shared commitment to not stealing from one another (and thus undermining the trust between members), and through a commitment to publicizing and defending the claims of incumbents against encroachment. The inability of a smaller group to corral the wider user population into an adherent state should not be interpreted as a lack of ability by the strollers to self-govern access to a shared resource. In the main, the public spaces involved were large, and by definition, incapable of being governed completely. For other, smaller spaces, respondents demonstrated that they were able to regulate access more effectively, as the group in occupation would act to both exclude others and ensure group compliance to standards that provided for sustained occupation.

The demonstration of accepted rules of the game by respondents alludes to the existence of informal institutions or a community logic governing a common-pool resource. It is not necessary for the principle behind these rules to be universally understood but rather that the rules are effective and relied upon by users within the stroller community (see Pejovich, 2012). These rules

have developed through the impact and requirements of the formal environment and through a shared acceptance of the need for governance amongst the repeated interactions of the homeless.

4.5 Trading rights amongst the homeless

The final component of the property rights definition is the ability to transfer the asset to others. A key limitation of the informal property rights is the inability of informal rights holders to successfully transfer or sell their rights to a third party in a similar manner to rights holders within the formal market (Sanghera and Satybaldieva, 2012). It is suggested that the property rights described by the respondents are categorized as *in personam* rights, or rights that vest in a specific individual. Unlike rights *in rem*, *in personam* rights are not capable of being transferred from person to person (Van der Walt, 2011). This reinforces the distinction between economic and legal property rights. Despite the clear conceptual difference between the two, a person without a correlative legal right is inhibited in her quest to translate an economic property right into gains. Respondents indicated that they did not trade their sleeping spaces amongst each other. We found this rather surprising as they traded other belongings and even traded activities such as temporarily giving up their space as a car guard, or good spots to beg. This may be attributed in part to an absence of tradable rights (and the associated lack of institutional support to enforce a claim), and through the *in personam* nature of the rights described by the respondent group. We pursued this further and two issues came to the fore. First, a genuine attachment to their living spaces and the stability it provided, and thus having no desire to move. *Funeka* stated that she was better off as long as she had her fixed space and that she could only sleep if she was in her own space. Second, and more fundamentally, they saw no value to trading in their spaces as it was not enforceable to the rest of the world and thus the value was to them alone. No one would ‘buy’ their space through some form of trade as ‘*only a dom (stupid) person would do that*’ (*Caleb, Green Point*).

The most commonly reported manner of accessing or trading an economic opportunity was either through opportunism or invitation. Respondents noted a willingness to act as temporary car guards, in the event that the existing rights holder either was not available on a particular day, or needed relief for a short period. An invitation to participate in an opportunity was conditional on the premise of adherence to the rules of the game. The right (with associated commercial benefit) could only be transferred to a person who would maintain the same behaviors that facilitated the establishment of the original right. Any deviation from the status quo could see the right destroyed

in its entirety, and thus removing any further commercial benefit at that location. In addition, the responses indicated that those who had received invitations to either participate with an incumbent in an opportunity (like the guarding of cars), or on behalf of an incumbent suggested that no transfer of a right had taken place. Respondents, in acting opportunistically in the absence of an invitation, could be seen as engaging in low-stakes opportunism but respondents would cede their temporary assumption of space back to the incumbent when challenged.

5. Conclusion

The role of property rights within economic and management theory means that it is important that we fully understand the complexities of what these rights entail. This paper has demonstrated, through the study of the extreme case of homelessness, that property rights are nuanced, and that they are not binary and instead can be thought of as a bundle of sticks. The existence of all the sticks is the ideal system of property rights but not all sticks may be in existence under all circumstances. This does not mean the absence of these rights but rather a weaker form of these rights may exist. Hann (2007, p. 310) argues that the bundle metaphor provides a useful way to address the complex systemic character of the ‘property infrastructure nexus’ and facilitates the study of ‘how changes in one aspect of the nexus affect other aspects and social relations generally.’

Our definition of property rights highlighted three key elements, namely, the right to derive value from the asset, to exclude others from using it, and to transfer the asset to others (Anderson and McChesney, 2003). But these rights may not always be complete and there may be limitations and we see these limitations on display in our case. Although the homeless are able to derive some value from the assets such as the mining of bins, and can exclude other members of their community from these assets (specifically the bins and their sleeping spaces), these rights are clearly precarious and are dependent upon state agents or the formal legal property owners not seizing the ‘property’ and overriding the community’s rules of the game. The transferring of assets was especially curtailed which demonstrates the insecurity of their rights with respondents recognizing that trading spaces was not enforceable outside of the community although we did see temporary trading as related to economic opportunities.

By examining homelessness we have sought to add to the rich tapestry of legal pluralism as regards property rights that are official or unofficial, formal or informal, enforced centrally or through community logics (Brown, 2015). We have demonstrated the intersectionality of claims and rights with respect to the same physical property from the varying perspectives of the claimants involved and how this differs depending on the type of property such as whether it is public or private. The obvious parallel to be drawn would be with informal settlements where squatters have occupied land that is publicly or privately owned (or some other form such as open access or common ownership) but there is an interesting twist on this in our case. Unlike the case of squatters, who often lay claim to the property rights attached to the land as a result of their occupation, the homeless exhibited no such claim against formal property holders - be it the state or private property owners. They recognized and respected the formal ownership mechanisms and saw no claim against those, but were adamant that they had economic property rights which they could enforce against other homeless. These rules of the game were commonly understood amongst the homeless and there was a clear hierarchy of how competing claims were managed, such as that related to length of tenure.

Our research shows that homeless people rely on a community logic to develop rules of the game which results in the appearance of a market logic (Venkataraman et al., 2016). In the absence of formal institutions effectively operating in the space of homelessness, the homeless themselves have constituted social norms which provide some semblance of property rights which are respected within the group. Without formal organizations, they implicitly through their actions determine 'membership, rules, monitoring, sanctions and hierarchy' (Ahrne et al., 2015, p 11). The homeless in effect construct, what McKague et al. (2015, p. 1087) call a 'social meaning' of property and build a local relational context for implementing the constructed meaning of that property space and this is pivotal for market development in the face of formal market failure in that context. Amongst our homeless, issues of territoriality are defined by the prevailing set of routines, norms and customs which are then extended to new exigencies (Schlicht, 2008, p. 622). For example, once a particular individual occupies a certain territory, which may initially be the outcome of a fight, the ownership effect will result in an entitlement in the territory and a partial recognition of the territorial rights of that individual: 'the rules *generate* incentives because they elicit entitlements and obligations and induce behaviors that will mutually be taken into account' -

resulting in an organizational equilibrium as peace (Schlicht, 2008, p. 616). In this way we see through repetition and diffusion, informal coping strategies taking on an institutional reality of their own. Instead of only recognizing formally sanctioned institutions, we see ‘institutional layering and complexity as a product of multiple sources of human action’ (Tsai, 2006, pp. 118, 121).

We see several areas for future research. Our study suggests that there may be scope for re-considering certain key aspects of property rights and examining more closely informal property rights’ institutions that emerge symbiotically with formal property rights, and crucially, emerge in a manner that is not responsive to formal rights’ institutions, and which takes into account the principle of property rights without a transactional future.

Second, there is further scope to examine the interaction between market and community logic and how this results in the institutionalization of rules and in overcoming market failures (Venkataraman et al., 2016). This has implications for how the poor are able to participate in market activities. For example, Brown (2015, p. 246) examines how collective use rights extend to public land and are crucial to the livelihoods of the urban poor and she states that the legal traditions in sub-Saharan Africa can often accommodate the broad definitions of what these rights entail because of the ‘mosaic of overlapping rights.’

Third, the dynamics of how these logics come to dominate and how they may change and be contested through space and time are important. Within some countries the formal might dominate over the informal or the market over the community logic but in others it might be the other way around, and in yet others it may change over time and spatially within the country itself. There are many example of companies that have the formal rights to land but this land has been ‘invaded’ by perceived ‘squatters’ without legal title but with an informal claim to that land and these rights are therefore contested. Formally the company may own the land but it may be unable to exercise its rights because the informal rights supersede its rights and different equilibria may emerge over time and space. These dynamics need further exploration.

In general, we echo the call of Helmke and Levitsky (2004, p. 734) that we need to ‘theorize more rigorously about the emergence of informal institutions and particularly about the

mechanisms through which informal rules are created, communicated, and learned’ and to ‘better understand the sources of informal institutional stability and change’.

6. References

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ⁱⁱ A Demsetzian property paradigm is by no means the only approach that we could follow and there are important questions to be raised about the paradigm itself (see for example Gudeman, 2008) but this paper examines the issue of homelessness within an economic framework to demonstrate the tension which arises between the economic construct and the reality of social and economic and political contexts which do not conform to its premises.

ⁱⁱⁱ The ownership (or in rem) approach has emerged from a restatement of traditional understandings of property rights (Claeys, 2011; Ellickson, 2011; Epstein, 2011; Merrill & Smith, 2001; Penner, 1996; Robilant, 2013). This traditional approach places property at the center of the definition of property rights; the quality of ‘thinghood’, as a posed to the relational quality noted above that forms part of the bundle understanding (Merrill & Smith, 2001; Penner, 1996). Critically, advocates of the ownership approach argue that a right to property is a right against the whole of the world, instead of a defined list of rights that form the basis of the bundle interpretation (Claeys, 2011; Ellickson, 2011; Epstein, 2011; Merrill & Smith, 2001; Penner, 1996; Robilant, 2013).

^{iv} ‘Economic rights theories’ are often used to explain the emergence of property rights in contexts where state authority does not reach (for example, the emergence of private property in developing countries’ common pool resources, or in historical contexts of the Western frontier, etc.), while ‘legal rights theories’ are prevalent when covering modern nation states with functioning bureaucracies.

^v This creates the possibility for the exchange of beneficial locations between members of the group, and the question of theft and violence as a substitute for trade. This issue is dealt with by Leeson (2007) in his innovative paper *Trading with Bandits*. Leeson concludes that in the absence of state policing, trade with bandits is possible as the agents (trader and bandit) will develop informal rules between themselves to avoid the destruction of gains-from-trade through the use of violence to steal such gains. Weaker parties can use credit terms and premium prices to offset losses through theft by stronger parties. The application of this argument to our target population can also be seen as the consequence of fighting in public over an advantageous location which could see the involvement of the police or private security services, and thereby result in the destruction in the gains-from-trade (control over the location). Relying on Leeson, this suggests that our target population may be able to negotiate around the use of force as a substitute for trade.